

Application Control No.: 10/037,630
Art Unit: 1755

PATENT
Docket No. 419-06

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	J. Blake Scott	Grp./A.U.:	6763
Appl. No.:	10/037,630	Examiner:	Paul D. Marcantoni
Filed:	01/03/02		
Title:	INCORPORATION OF DRILLING CUTTINGS INTO STABLE LOAD-BEARING STRUCTURES		

SUPPLEMENTAL REPLY BRIEF UNDER 37 C.F.R. § 41.41

This is Appellants' supplemental reply brief under 37 C.F.R. § 41.41 to the perceived new assertions and/or arguments in the Supplemental Examiner's Answer (hereinafter usually abbreviated as "SEA") mailed on May 31, 2007 that were not in the Examiner's answer mailed on 11/29/2006. A Reply Brief to the first Examiner's Answer was already filed on 01/22/2007. This brief does not constitute a concession that any statement from the original Examiner's Answer that was contested in Appellants' original reply brief has been satisfactorily answered in the SEA. In particular, this does not constitute a concession that the record of this application contains any case of *prima facie* obviousness meeting the requirements mandated by authorities, as extensively cited in the original Reply Brief and still remaining unaddressed in the SEA.

VII. Additional Argument in Response to Statements Beginning on Page 11 of the SEA

Contested Assertion in the SEA: “[Column 8, lines 18 – 22 of Polston describe an operation that is] appellant’s (2.1.2 step) of forming the cement mixture into the shape and size of the load bearing structure” {Page 11 of the SEA, next-to-last full paragraph on the page; also page 13, first paragraph}

Rebuttal: Appellants respectfully submit that this assertion is an example of the Examiner’s continuing misunderstanding of the Polston reference, based on consideration of only part of the reference: In Figure 2, above reference number **19**, in the part of the Polston reference cited in this assertion as the impervious layer on which the mixed material is stored during curing, there is plainly visible a multi-lobed shape containing the legend “CURING (48HRS)”, and this multi-lobed shape is not that normally associated with the final “shape and size” of a road. Furthermore, at column 4 lines 38 – 42, Polston contains the following sentence, “The result of the novel process is to provide a novel road base composition which is made up of treated oil and gas waste material and an aggregate and to **apply such composition to a road base location**” [emphasis added].

Therefore, considering the entire reference, it is clear to those skilled in the art that the material made in accordance with the description of column 8 lines 18 – 22 is a particulate aggregate that does not assume its final size and shape as required by pending claim 1 until it is “applied at a road base location” as specified at column 4 lines 41 – 42.

Still further, at column 3 lines 26 – 30, Polston states, “The manufactured road base typically is mixed, processed, and likewise **stored** surrounded by an earthen berm and on a cement pad and/or other physical barrier that will prevent leaching of liquid contaminates into the soil” [emphasis added]. A road in its final size and shape is not “stored”; it is already where it belongs.

The above interpretations of the reference are supported in the Declaration of Dr. Little already of record.

Contested Assertion in the SAE: “[T]he mixture [formed as described in column 8 lines 18 – 22 of Polston] will undergo a pozzolanic reaction in the same manner as appellants’ process because Polston also teaches adding a pozzolan ...”
{Page 11 of the SEA, last full paragraph on the page}

Rebuttal: The mixture may indeed undergo a pozzolanic reaction as stated, but it will not satisfy the limitation of pending claim 1 that such reaction occurs after being formed into the final size and shape for use. Instead, most of the pozzolanic reaction if any will occur during the storage period, before the mixture is applied to a road base location.

Contested Assertion in the SEA: “The appellant’s statement that they believe there is ‘no’ pozzolanic reaction in Polston after all the components are mixed is in error.” {Page 13, second paragraph}

Rebuttal: The appellants made no such statement as is asserted in this part of the SEA.¹ The actual position of the appellants was as follows, “With that [Polston] method, there is no reason to believe that any pozzolanic reaction or asphaltic stabilization as recited in appealed claim 1 takes place **after the road base has been finally shaped**, as required in appealed claim 1. The occurrence of such a subsequent pozzolanic reaction and/or asphaltic stabilization is particularly unlikely in view of the teaching in the only prior art reference relied on that the particulate matter made according to the teachings of that reference is “generally stored” before being spread in place.” [emphasis added] Appellants believe, as stated by the Examiner, that a pozzolanic reaction will occur in a mixture taught by Polston if the mixture includes a pozzolan, but in a process as taught by Polston, most if not all of such reaction will occur while the material is still being stored for curing, not after the material has been finally shaped.

¹ Appellants have searched the Word text of their already submitted reply brief and determined that, according to the search function of this word processing software, the phrase “no pozzolanic” does not occur anywhere in the reply brief.

Contested Assertion in the SEA: “The appellant ... argues that Polston does not mean “road base” but only the “particulate product” that is suitable for spreading out later to create a real road base. In rebuttal, if Polston teaches that it can be used for a road base, he meets [sic] thus also teaches a road base!” {Page 14, last paragraph}

Rebuttal: The argument ascribed to the appellants in the first sentence is made by the appellants only for certain instances of the use of the term “road base” by Polston. This point is extensively discussed in the earlier reply brief. The appellants have never denied that Polston in its entirety teaches a road base, but rather assert that (i) in *certain parts* of the Polston specification, the phrase “road base” really means only a particulate product and (ii) Polston does not teach any process for making a road base, which is the subject matter claimed here, that meets of the limitation of the claims on appeal. The fact that Polston as a whole teaches some kind of road base is not dispositive of the issue on appeal, which is whether Polston teaches or suggests a *process* as claimed in the appealed claims for making whatever road base Polston may teach.

Contested Assertion in the SEA: The appellant’s instant claims means [sic] that any mixture comprising drilling cuttings in any amount, even residual or trace amounts, and at least one of [several pozzolans] in any amount, even trace or residual amounts, will provide a rutting resistance [as specified in appealed claim 1]” {Page 15, third paragraph}

Rebuttal: In this assertion, the Examiner appears to have stated his own belief and ascribed that belief to the claims on appeal. The claims could not possibly “mean” what the Examiner states if “mean” as used in this contested assertion to be equivalent to “establish as a fact”, and the statement ascribed to the appellants’ claims in this contested assertion is totally contrary to what appellants actually believe, as set forth on pages 3 through 5 of the original Reply Brief.

*Contested Assertion in the SEA: “Applicant notes in their specification on the top two lines of page 27 that the thickness values recommended in Table 2 ... can accommodate at least 10,000 applications of a single axle load of 18,000 pounds will have a depth of rutting that is less than 1 inch. This means that the road base **of the prior art** would have to be at a minimum at least 8 inches thick to achieve appellant’s claimed property.” [bold face emphasis added; underline emphasis in original] {Page 16, first paragraph}*

Rebuttal: The first sentence of this assertion is not contested and is included only to give context to the second sentence, which is vigorously contested and certainly does not logically follow from the first sentence, as implied by the assertion: First, the only prior art shown in the referenced table of the specification is the “Control”, which is stated on page 25 of the specification to be “a compacted crushed limestone gravel base”. This kind of base is certainly part of the prior art, but it is not part of the Polston reference on which the rejection on appeal is purportedly based. Second, the entire description of the specification from page 24 line 28 through page 25 line 17 applies only to *continuous* load bearing structures, not to particulate ones as taught by Polston. Third, page 27 lines 7 through 11 of the specification notes that the values given in the table are exact “only for the specified purposes and conditions” and therefore these values should not be grandly generalized to apply to all the prior art.

Contested Argument in the SEA: The remaining substantive paragraphs of the SEA are used to establish at substantial length that road bases at least 8 inches in thickness are known in the prior art. {Page 16 last paragraph through page 18 first paragraph}

Rebuttal: The appellants do not contest that the prior art has taught road bases at least 8 inches in thickness but do contest the relevance of it. The dispositive question is whether any prior art suggests the claim as a whole, including all its limitations. Neither Polston nor either of the two additional references adduced in

the SEA² teaches or suggests the rutting resistance that is an integral part of claim 1 and all the other claims on appeal, and for the reasons set forth in the original Reply Brief, this rutting resistance can not be properly assumed to result from using the same components. The specification for the claims on appeal advances the art by giving an assurance of achieving this rutting resistance with a particular thickness under specified conditions on the strength of the subsoil, and neither the old nor the new references, whether considered alone or together, even suggests such a possibility in the absence of the teachings of the instant specification.

CONCLUSION

For the reasons stated above, Appellants respectfully submit the Examiner's final rejection of claims 1-5, 8-10, 13, and 16-20 should be reversed. Should any fees be due for entry and consideration of this Brief that have not been accounted for, the Commissioner is authorized to charge them to Deposit Account No. 160750.

Respectfully submitted,

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² The full text versions of the patent specifications newly adduced by the Examiner and available on the U.S.P.T.O. web site were searched for the three consecutive letters "rut". The search showed no such occurrence except in the word "Beirut", which is part of the address of at least one of the inventors.